No. 89-1048

In the Supreme Court of the United States

OCTOBER TERM, 1989

FMC CORPORATION, PETITIONER

v.

CYNTHIA ANN HOLLIDAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Section 514 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144, preempts the application of state insurance laws to uninsured employee benefit plans.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

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INTEREST OF THE UNITED STATES

This case involves an application of the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144. The court of appeals construed that provision to mean that a state law regulating insurance may be applied to uninsured employee benefit plans, so long as the law does not regulate what the court termed "core ERISA concerns." Pet. App. A19. The Secretary of Labor enforces the reporting, disclosure, and fiduciary obligations that ERISA imposes on private employee benefit plans. She therefore has a strong interest in the proper interpretation of ERISA's preemption provision, which Congress enacted to promote the development of private pension and welfare

plans and to assure uniform regulation of such plans. Moreover, the decision of the court below is inconsistent with Department of Labor opinion letters concluding that state insurance laws are preempted insofar as they apply to uninsured plans. See pages 18-19 and note 13, *infra*.

STATUTORY PROVISIONS INVOLVED

Section 514(a) of ERISA, 29 U.S.C. 1144(a)—the basic preemption clause—provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Section 514(b)(2)(A) of ERISA, 29 U.S.C. 1144(b)(2)(A)—the "savings clause"—provides:

> (2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

Section 514(b)(2)(B) of ERISA, 29 U.S.C. 1144(b)(2)(B)—the "deemer clause"—provides:

> (B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

STATEMENT

1. Petitioner FMC Corporation operates the FMC Salaried Health Care Plan, an employee welfare plan within the meaning of Section 3(1) of ERISA, 29 U.S.C. 1002(1). The Plan provides health benefits to FMC employees and their dependents. FMC does not purchase a group insurance policy from an insurance company in order to provide benefits under the Plan, but instead pays benefits from its general assets. Pet. App. A2-A3, C1, C10.

Respondent Cynthia Ann Holliday is the daughter of Gerald Holliday, an FMC employee and subscriber to the Plan. She was seriously injured as a passenger in an automobile accident and the Plan paid substantial medical expenses on her behalf.[1] In accordance with the Plan's subrogation clause, Mr. Holliday signed a "third-party reimbursement form" agreeing that if he brought a liability claim against any third party, he would include benefits payable by the Plan

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[1] Ms. Holliday's medical expenses totalled more than $178,000 by 1989. The first $10,000 of her medical expenses were paid by Mr. Holliday's automobile insurer. Pet. App. A2-A3. It is not clear from the record what portion of the remainder was paid by the Plan, although the amount exceeds $67,000. C.A. App. 67a. It appears that the Hollidays also obtained recovery from Pennsylvania's Catastrophic Loss Trust Fund See Br. in Opp. 3; 75 Pa. Cons. Stat. Ann. §§ 1761 *et seq.* (Purdon 1989) (repealed December 12, 1988). The Hollidays have not alleged that they have paid any of the medical expenses.

in his claim and would reimburse the Plan for the benefits provided. Pet. App. A3-A4, C1-C2.[2]

Mr. Holliday brought a negligence action on behalf of his daughter in Pennsylvania state court against the driver of the automobile in which she was injured. The parties entered into a settlement of that action under which respondent is entitled to $49,875.50 plus accrued interest.[3] While the action was pending,

[2] Because the courts below held that the Plan's subrogation provision is void under Pennsylvania law and that the state law is not preempted by ERISA, they did not consider the precise meaning of the subrogation provision or its application to the facts of this case. In our view, federal common law properly applies in construing a subrogation clause in an employee benefit plan covered by ERISA. See 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits), *reprinted in* 3 Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 4670-4671 (Comm. Print 1976) ("[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans"); *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987) (recognizing Congress's "expectation[] that a federal common law of rights and obligations under ERISA-regulated plans would develop"). While it is not appropriate at this time to determine the rule that should apply as a matter of federal law, it should be noted that, under general principles of subrogation law, FMC would not be allowed to obtain full reimbursement out of a tort recovery if the Hollidays had not been made whole. See R. Jerry, II, *Understanding Insurance Law* 467 (1987). Instead, if the family was required to pay some of Ms. Holliday's medical expenses, then the subrogation clause would be construed either to call for prorating the tort recovery between FMC and the Hollidays, or to call for FMC to recover only the amount in excess of the family's payments. *Ibid.*

[3] The parties to the negligence action settled the case after the defendant driver interpleaded his $100,000 automobile

FMC notified the Hollidays that it would seek reimbursement for the amounts it had paid for respondent's medical expenses. The Hollidays informed FMC that they would not reimburse the Plan, asserting that Section 1720 of the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. Ann. § 1720 (Purdon 1989), precludes subrogation by FMC. Pet. App. A3-A5, C2-C3.[4]

2. Petitioner then filed this declaratory judgment action in federal district court. On cross motions for summary judgment, the district court held, first, that "if it is not preempted, § 1720 of the Pennsylvania law would prohibit FMC's exercise of subrogation rights in any amount Holliday recovered" on his claim against the driver. Pet. App. C7.

The court then ruled that Section 514 of ERISA, 29 U.S.C. 1144, does not preempt application of the state statute. The court noted that Section 514(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," and that the "Pennsylvania law 'relates to' the Plan." Pet. App. C7, C8. However, the court added, the saving clause, Section 514(b)(2)(A), provides that ERISA does not "exempt or relieve any person from any law of

policy in favor of Ms. Holliday and three other claimants injured in the accident. Pet. App. A3. Under the terms of the state court order approving the settlement, Ms. Holliday's recovery is being held in escrow pending the outcome of this case. Pet. 5 n.3.

[4] Section 1720 states as a general rule that "[i]n actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery." There is no exception barring double recovery. Thus, even if the Plan had paid all of Ms. Holliday's medical expenses, it would be barred by Section 1720 from asserting any subrogation rights.

any State which regulates insurance," and "the parties have agreed that this law regulates insurance." Pet. App. C7, C10.

The district court then turned to the "deemer clause," Section 514(b)(2)(B), which provides that "[n]either an employee benefit plan * * * nor any trust established under such a plan, shall be deemed to be an insurance company * * * or to be engaged in the business of insurance * * * for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts." The court recognized that "FMC provides the funds needed to pay any medical benefits due under the Plan out of its own assets," and that, in light of the deemer clause, "a number of courts have held that certain state laws regulating insurance are nonetheless preempted as they apply to self-insured plans." Pet. App. C10, C11. Indeed, as the district court acknowledged (*id.* at C11), this Court in *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 747 (1985), in upholding application of a state law requiring insurance companies to provide certain benefits in any policy they issue, stated that it was "aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not." However, relying on *Northern Group Services, Inc.* v. *Auto Owners Insurance Co.*, 833 F.2d 85, 93 (6th Cir.), cert. denied, 486 U.S. 1017 (1988), and "certain aspects of the legislative history," the district court held that "the effect of the deemer clause should be assessed by a balancing of the interests in federal uniformity against those of state primacy in the regulation of insurance." Pet. App. C13. The court then concluded that the state interest outweighed the federal interest because preemption "would encroach upon state law in an area in which states enjoy 'general authority and autonomy' —insurance regulation." *Id.* at C14 (citing *Northern Group Services*, 833 F.2d at 93-94).

3. The court of appeals affirmed. Pet. App. A1-A27. On the preemption issue,[5] the court of appeals recognized that the case "turns on whether FMC's Salaried Health Plan falls within the deemer clause exception insulating employee plans from state regulation." *Id.* at A18. The court held that Section 1720 is not preempted because, it concluded, "the deemer clause is meant mainly to reach back-door attempts by states to regulate core ERISA concerns in the guise of insurance regulation." Pet. App. A19.

In support of that construction of the statute, the court of appeals noted that the deemer clause refers to "any state law 'purporting' to regulate insurance." Pet. App. A19. The court added that two comments on the floor of Congress "displayed concern for pretextual state infringements." *Ibid.* Furthermore, the court found significance in the fact that the deemer clause first appeared in a version of the bill that would have preempted only those laws "relat[ing] to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any [covered] employee benefit plan"; the court said that "the retention of the deemer clause in the face of the expanded preemption clause indicates that the deemer clause in effect was meant to do the more narrow, specified work which the original version of

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[5] The court of appeals also affirmed the lower court's ruling that Section 1720 of the Pennsylvania Motor Vehicle Financial Responsibility Law, if not preempted, bars FMC from enforcing the subrogation provision. Pet. App. A5-A10. Petitioner has not sought review of that holding, which involves a question of state law.

the preemption clause was meant to do." *Id.* at A20, A23. Finally, the court dismissed this Court's statement in *Metropolitan Life* that uninsured plans are not subject to state regulation on the ground that "the Court cited neither statutory text nor legislative history," but instead "rel[ied] on vague language in Congress' *post hoc* study" of the effect of the preemption provision. *Id.* at A25.

The court of appeals similarly dismissed, as erroneously relying on "Supreme Court dicta," the numerous decisions of other courts of appeals holding that "the deemer clause incorporates a bright line distinction between employee benefit plans that purchase insurance and those, like FMC's, which are self-insured." Pet. App. A24. In any event, the court said, citing *Northern Group Services* (833 F.2d at 94-95), "the distinction between insured and self-insured plans does not disappear" under its construction of the preemption clause. Pet. App. A26. Rather, "insured plans would *per se* survive the deemer clause, while self-insured plans would merely be considered on a case-by-case basis as to whether the state regulation involved affects a central concern of ERISA." *Id.* at A26-A27.

SUMMARY OF ARGUMENT

The courts below erred by failing to conclude that the deemer clause prohibits state regulation of uninsured employee benefit plans. Indeed, that is the only reasonable interpretation of Section 514. The basic preemption provision, Section 514(a), broadly preempts state law, while the saving clause, Section 514(b)(2)(A), excepts laws regulating insurance from preemption. The deemer clause makes clear that uninsured employee benefit plans are not to be

considered insurance companies, and hence are not within the saving clause's exception to preemption.

1. This Court adopted that straightforward reading of Section 514 in *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985). The Court held that insured employee benefit plans may be indirectly regulated by the States in that they may regulate the terms of insurance offered to those plans by insurance companies. The Court explicitly recognized that its "decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not." *Id.* at 747. The Secretary of Labor, whose interpretation is entitled to deference, has also long construed Section 514 to protect uninsured employee benefit plans from state regulation.

2. The court of appeals' interpretation of Section 514, in contrast, has no basis in the language of the statute itself. The court suggested (Pet. App. A19) that because the deemer clause refers to laws "purporting to regulate" insurance, Congress was concerned only with pretextual attempts to regulate employee benefit plans. This is, at best, a strained and unnatural reading of the statute. By that language, Congress merely intended to emphasize that a law applying to insurance companies would not extend to uninsured employee benefit plans. Moreover, the test devised by the court of appeals does not distinguish pretextual regulations from other state laws, but focuses on whether "core ERISA concerns" (Pet. App. A19) are at issue.

Nor does the legislative history support the court of appeals' construction. Indeed, the court's use of that history (Pet. App. A23) flies directly in the face of the clearly expressed purpose of Congress.

The fact that the deemer clause originated in a bill providing for more limited preemption does not remotely suggest that the deemer clause continued to have limited preemptive effect when the scope of preemption mandated by the bill was expanded. To the contrary, the authors of the expansive preemption provision stressed its breadth, and the language of the deemer clause reflects that breadth by providing that "any law of any State purporting to regulate insurance companies [or] insurance contracts" is preempted insofar as it applies to uninsured plans. Moreover, the court of appeals' construction of the statute gives Section 514(a) a very limited effect—under that construction, state insurance laws may regulate insured employee benefit plans to an unlimited extent and may *also* regulate uninsured plans except for regulation that infringes on ERISA's "core" areas.

3. The court of appeals' approach is also defective in that it threatens to encourage litigation over whether a state insurance law affects a "core" area. One of the virtues of the approach Congress adopted by enacting a broad preemption provision, along with the bright-line distinction between insured and uninsured plans recognized by this Court in *Metropolitan Life*, is that such litigation may be avoided. In addition, Congress enacted ERISA's broad preemption provision in order to allow plan designers to tailor plans to the needs of the beneficiaries and the sponsors, and to ensure that multistate plans would not be subject to inconsistent regulation. The court of appeals' holding directly conflicts with those goals, since FMC's reasonable decision to pay health benefits to victims of automobile accidents, while insisting on reimbursement if a tort recovery is obtained, is overruled in those States that prohibit subrogation clauses. The statute does permit inconsistent regulation with respect to plans that choose to obtain insurance, but that result logically follows from Congress's decision broadly to preempt state law while preserving the States' traditional role as the primary regulators of insurance companies.

ARGUMENT

ERISA'S "DEEMER CLAUSE" PROHIBITS STATE REGULATION OF UNINSURED EMPLOYEE BENEFIT PLANS

The courts below correctly held (Pet. App. A13-A15, C8-C9) that Section 1720 of the Pennsylvania Motor Vehicle Financial Responsibility Law, as applied to bar FMC's assertion of subrogation rights, "relate[s] to" an employee benefit plan and thus falls within the "expansive sweep" (*Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 47 (1987)) of ERISA's basic preemption provision. As the court of appeals noted (Pet. App. A13-A15), the Pennsylvania law clearly has "a connection with or reference to" FMC's plan (*Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)) since, by the terms of the plan document, FMC has a right of recoupment from a subsequent tort recovery.[6] The Pennsylvania law overrides that right, requiring the Plan to assume ultimate responsibility for payment of benefits even

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[6] A subrogation provision such as FMC's is a reasonable and permissible method of reducing an employee benefit plan's costs while ensuring that beneficiaries' primary needs are covered. See R. Jerry, *supra*, at 464; compare *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (upholding pension plan provision reducing retirement benefits by the amount of any workers' compensation award).

where the beneficiary recovers medical expenses from a third party.[7]

The court of appeals also correctly concluded (Pet. App. 16-18, C9-C10) that the Pennsylvania statute falls within Section 514's saving clause, which exempts from preemption state laws "which regulate[] insurance." Section 514(b)(2)(A), 29 U.S.C. 1144 (b)(2)(A). The Pennsylvania statute regulates "the business of insurance" as those terms have been construed under ERISA's saving clause and the McCarran-Ferguson Act. By regulating subrogation rights, the state law transfers a policyholder's risk (in this instance, *back* to FMC), affects an integral part of the policy relationship between an insurer and insured, and is aimed principally at a practice of the insurance industry. See *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 743 (1985).[8] The main effect of the law, in other words,

[7] Other courts have concluded that similar state laws "relate[] to" employee benefit plans. See *United Food & Commercial Workers* v. *Pacyga*, 801 F.2d 1157, 1160 (9th Cir. 1986) (Arizona common law prohibition against subrogation "relates to" an employee benefit plan); *Northern Group Services, Inc.* v. *Auto Owners Insurance Co.*, 833 F.2d 85, 89 (6th Cir. 1987), cert. denied, 486 U.S. 1017 (1988) (coordination of benefits provision of Michigan no-fault automobile liability statute falls within preemptive scope of Section 514(a)); see also *Shaw*, 463 U.S. at 95-100 (mandated benefits law "relate[s] to" employee benefit plan); *Alessi*, 451 U.S. at 524 (ERISA preempts New Jersey statute forbidding benefit plans from offsetting workers' compensation payments against employee pension benefits).

[8] Accord *Pacyga*, 801 F.2d at 1160-1161; *Northern Group Services*, 833 F.2d at 89-90 (coordination of benefits provision of Michigan no-fault automobile insurance law regulates insurance within the meaning of ERISA's saving clause);

is to prevent insurers from obtaining reimbursement, despite a contract calling for subrogation, where the beneficiary prevails in a tort action and obtains an additional recovery.

The courts below erred, however, by concluding that Section 1720 of the Pennsylvania Motor Vehicle Financial Responsibility Law is saved from preemption in this case. Although the saving clause excepts from preemption laws regulating insurance, the deemer clause makes clear that uninsured employee benefit plans are not subject to such laws. In this case, application of the Pennsylvania statute would have a major impact on FMC's uninsured Plan, since despite the clear language of the Plan, it would not be able to recoup its payments where recovery is obtained from a tortfeasor.

A. As This Court Concluded In *Metropolitan Life*, Congress Authorized The States To Regulate Indirectly Those Employee Benefit Plans That Obtain Insurance But Did Not Authorize The States To Regulate Uninsured Plans

1. A common-sense reading of Section 514 compels the conclusion that uninsured employee benefit plans are not subject to regulation by the States. By providing that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," Section 514(a) broadly preempts state law. *Pilot Life*, 481 U.S. at 47; *Shaw*, 463 U.S. at 97. Section 514(a) was intended "to foreclose any non-Federal regulation of employee benefit plans." 120 Cong. Rec. 29,197 (1974) (re-

contra *Baxter* v. *Lynn*, 886 F.2d 182, 186 (8th Cir. 1989) (common law rules on subrogation are not the type of state insurance regulation intended to fall within scope of saving clause).

marks of Rep. Dent), *reprinted in* 3 Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 4670 (Comm. Print 1976) [hereinafter *Leg. Hist.*].[9]

The saving clause, Section 514(b)(2)(A), excepts insurance laws from the expansive preemption provision. Insurance companies have traditionally been subject to state regulation, and Congress in 1945 recognized the traditional primacy of the States by enacting the McCarran-Ferguson Act, which provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxa-

[9] Section 514(a) was added by the Conference Committee after both houses had passed bills that preempted state laws only to the extent that they conflicted with certain matters regulated by ERISA. Representative Dent explained the Conference substitute by stating: "I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29,197 (1974), *reprinted in* 3 *Leg. Hist.* 4670. Senator Williams similarly explained the Conference action, stating: "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." 120 Cong. Rec. 29,933 (1974), *reprinted in* 3 *Leg. Hist.* 4745-4746.

tion of such business." 15 U.S.C. 1012(a). The saving clause preserves the States' role as the principal regulator of the insurance industry.

However, in the deemer clause, Section 514(b)(2)(B), Congress made clear that, while state regulation of the insurance industry was not to be preempted, no employee benefit plan "shall be deemed to be an insurance company." "Consequently, a state may not regulate an employee benefit plan simply because the plan serves as self-insurer on all of its benefits. Thus, the deemer provision prevents a state from subjecting a plan, as a business of insurance, to the state's general insurance laws." *Wadsworth* v. *Whaland*, 562 F.2d 70, 77 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978).

The Court endorsed this straightforward reading of Section 514 in *Metropolitan Life*. The issue in that case was whether a state mandated-benefit law, as applied to policies purchased from insurance companies by employee health care plans, was saved from preemption by ERISA's saving clause. 471 U.S. at 727. Holding that the law was not preempted, the Court reasoned that a state law's regulation of the contracts sold by insurance companies is saved as a law which "regulates insurance," notwithstanding its indirect effect on employee benefit plans that enter into those contracts. The Court "declined] to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it." *Id.* at 746.

The Court's holding in *Metropolitan Life* pertained directly to the effect of the saving clause on insured plans because, "[i]n light of ERISA's 'deemer clause,' * * * Massachusetts ha[d] never tried to enforce [the state mandated benefit law] as

applied to benefit plans directly, effectively conceding that such an application of [state law] would be preempted." 471 U.S. at 735 n.14. Indeed, the Massachusetts Supreme Judicial Court, also recognizing that Section 514 bars regulation of uninsured employee benefit plans, had held that the part of the state law applicable to insurers was severable from the preempted portions pertaining directly to benefit plans. *Ibid.* In light of Massachusetts' concession, the Court's holding related to the saving clause, but in interpreting that clause the Court construed the deemer clause as an integral part of its analysis. Noting that the deemer clause specifically refers to "insurance contracts," this Court read the reference as indicating that the saving clause encompassed laws affecting insurance contracts: "Unless Congress intended to include laws regulating insurance contracts within the scope of the insurance saving clause, it would have been unnecessary for the deemer clause explicitly to exempt such laws from the saving clause when they are applied directly to benefit plans." *Id.* at 741.[10]

The Court recognized that the deemer clause precludes state regulation of uninsured employee benefit plans. It explained: "We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we

[10] See also 471 U.S. at 744 ("the plain language of the saving clause, *its relationship to the other ERISA pre-emption provisions*, and the traditional understanding of insurance regulation, all lead us to the conclusion that mandated-benefit laws such as [the Massachusetts statute] are saved from pre-emption by the operation of the saving clause") (emphasis added).

merely give life to a distinction created by Congress in the 'deemer clause,' a distinction Congress is aware of and one it has chosen not to alter." 471 U.S. at 747.[11] Although no uninsured plan was at is-

[11] The Court knew that Congress was aware of the distinction between insured and uninsured plans because the matter had been addressed by the 1977 Activity Report of the House Committee on Education and Labor, which contains the report of a Congressional Pension Task Force established pursuant to ERISA to study ERISA preemption. The Report had stated that persons selling insurance policies may be subject to state regulation, but that "state action is barred" with respect to plans themselves. See 471 U.S. at 747 n.25 (quoting H.R. Rep. No. 1785, 94th Cong., 2d Sess. 48 (1977)); see also *id.* at 47 ("the 'deemed' language was utilized to create an irrebuttable presumption that these [employee benefit] plans are not insurance, trust companies, etc., for purposes of state regulation").

In addition, in 1983 Congress created a limited exception providing that specified parts of a Hawaii health care statute enacted before ERISA are not preempted. 29 U.S.C. 1144 (b)(5), added by the Act of Jan. 14, 1983, Pub. L. No. 97-473, § 301(a), 96 Stat. 2611. The amendment was precipitated by an uninsured employee benefit plan's successful challenge to the Hawaii statute on the ground that it was preempted by ERISA. *Standard Oil Co.* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), aff'd mem., 454 U.S. 801 (1981). Representative Erlenborn, the ranking minority member of the House Committee on Education and Labor, explained that Congress viewed the Hawaii law as "an unusual special case," and stated that "[i]n agreeing to the Hawaii exception this body will be reaffirming the broad scope of ERISA preemption and the validity of the interpretation of the Federal courts in connection with the Hawaii statute." 128 Cong. Rec. 30,356 (1982). Accordingly, Congress expressly declined to save any other similar state law, providing instead that the amendment "shall not be considered a precedent with respect to extending such amendment to any other State law." § 301(b), 96 Stat. 2612.

sue in *Metropolitan Life*, the Court's statement flows naturally both from the language of Section 514 and the Court's holding. Indeed, the Court's holding with respect to the scope of the saving clause was grounded in its understanding of the relationship of that clause to the basic preemption provision and the deemer clause.[12]

Like this Court, the Secretary of Labor consistently has interpreted the deemer clause to insulate uninsured employee benefit plans from state insurance regulation. Shortly after ERISA's enactment, the Secretary concluded that since the deemer clause "adopts a distinction between insurance and employee benefit plans," a state law was preempted in-

[12] Following the lead of *Metropolitan Life*, the clear majority of the courts of appeals that have addressed the issue have held that ERISA preempts direct state regulation of uninsured employee benefit plans. *Baxter* v. *Lynn*, 886 F.2d at 186; *Reilly* v. *Blue Cross & Blue Shield United*, 846 F.2d 416, 425 (7th Cir.), cert. denied, 488 U.S. 856 (1988); *Moore* v. *Provident Life & Accident Insurance Co.*, 786 F.2d 922, 927 (9th Cir. 1986) ("uninsured plans are regulated exclusively by the provisions of ERISA"); *Pacyga*, 801 F.2d at 1162; *Powell* v. *Chesapeake & Potomac Telephone Co.*, 780 F.2d 419, 423 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986); *Children's Hospital* v. *Whitcomb*, 778 F.2d 239, 242 (5th Cir. 1985) ("ERISA preempts the Louisiana [mandated-benefit] statute insofar as it relates to a self-insured plan, although it would not preempt if the plan were an insured plan."); accord *Insurance Board of Bethlehem Steel Corp.* v. *Muir*, 819 F.2d 408, 411 (3d Cir. 1987) (*Metropolitan Life* "concluded that ERISA permitted states to regulate insurance policies purchased by plans from insurance companies, though ERISA did not permit states to regulate the plans themselves"); see also *Wadsworth* v. *Whaland*, 562 F.2d at 76 n.34. But see, in addition to the decision below, *Northern Group Services*, 833 F.2d at 95.

sofar as it "require[d] employers who have established self-insured plans for their own employees to meet requirements for insurance companies." United States Department of Labor, ERISA Opinion Letter No. 75-128, at 1 (June 20, 1975).[13] The Secretary's reasonable construction of the statute she administers is entitled to deference.[14]

[13] See also ERISA Opinion Letter No. 78-3A, at 2 (Feb. 15, 1978) ("to the extent that the proposed act in the Utah State Legislature to regulate non-insured employee welfare benefit plans may be applicable by its terms to employee benefit plans covered by ERISA, the proposed Act would be preempted by § 514 of ERISA" because, "under § 514 (b) (2) (B) of ERISA, an employee benefit plan subject to ERISA may not be deemed to be an insurance company * * * for the purpose of state laws purporting to regulate insurance companies [or] insurance contracts"); ERISA Opinion Letter No. 79-6A, at 3 (Jan. 16, 1979) ("[a]lthough state insurance laws are excepted from preemption by section 514(b) (2) (A), section 514(b) (2) (B), in effect, prevents a state from regulating an employee benefit plan simply because the plan self-insures its benefits"); ERISA Opinion Letter No. 82-00[illegible]A, at 3 (Jan. 29, 1982) (Section 514 does not preempt application of a New Hampshire statute insofar as the statute "require[s] an insurance company to issue extended eligibility coverage to its policyholders, even though some such policyholders may be employee welfare plans," but does preempt the portion of the statute regulating self-insured plans).

[14] *Massachusetts* v. *Morash*, 109 S. Ct. 1668, 1673-1674 & n.11 (1989); *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167 (11th Cir. 1988) ("we note that we owe great deference to the interpretations and regulations of the Pension Benefit Guaranty Corporation* * *, the Internal Revenue Service * * *, and the Department of Labor, which are the administrative agencies responsible for enforcing and interpreting ERISA"); see generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense*

2. This straightforward reading of Section 514 stands in sharp contrast to the court of appeals' conclusion (Pet. App. A19) that the deemer clause is meant to preclude only state insurance regulation related to "core" ERISA concerns.[15] The only textual argument below was the court of appeals' comment that the deemer clause refers to state laws "purporting" to regulate insurance. *Ibid.* But its suggestion that by that term Congress meant to limit the effect of the clause to "pretextual" attempts to regulate ERISA plans represents a strained and unnatural reading of the statute. In our view, the term simply serves to emphasize that the deemer clause is an exception to the saving clause, and that laws applying to insurance companies do not directly govern employee benefit plans. Cf. Section 514(c)(2), 29 U.S.C. 1144(c)(2) ("[t]he term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which *purports to regulate*, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter") (emphasis added).[16] In any event, the

Council, Inc., 467 U.S. 837, 844 (1984); *Sullivan* v. *Everhart*, 110 S. Ct. 960, 961 (1990).

[15] In its only effort to define those concerns, the court of appeals referred to "such ERISA areas as reporting, disclosure, and nonforfeitability." Pet. App. A23.

[16] The court's emphasis upon the term "purporting" also is undercut by the legislative history of Section 514. The Conference Report's description of the deemer clause does not refer to the "purporting" language, strongly suggesting that the term does not have the overriding significance attributed to it by the court of appeals. See H.R.Conf. Rep. No. 1280, 93d Cong., 2d Sess. 383 (1974) ("[h]owever, the substitute generally provides that an employee benefit plan

court's interpretation of the provision's language as referring to pretextual attempts to regulate ERISA plans is unrelated to the preemption standard it ultimately adopted: "whether the state insurance regulation *intentionally or unintentionally* addresses a core type of ERISA matter which Congress sought to protect by the preemption provision." Pet. App. A27 (emphasis added).

Nor does the legislative history of Section 514 support the lower courts' decision. As noted (see note 9, *supra*), the Conference Committee broadened the preemptive scope of Section 514(a) while retaining the saving clause and the deemer clause contained in the bill that originally passed the House. See *Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform* 32-34 (June 12, 1974), *reprinted in* 3 *Leg. Hist.* 5282-5284. The conferees stressed that the revised preemption provision, "with the narrow exceptions specifically enumerated, * * * foreclose[s] any non-Federal regulation of employee benefit plans." 120 Cong. Rec. 29,197 (1974) (remarks by Mr. Dent), *reprinted in* 3 *Leg. Hist.* 4670.[17] Relying on

is not to be considered as an insurance company (and is not to be considered as engaged in the business of insurance or banking) for purposes of any State law *that regulates* insurance companies, insurance contracts, banks, trust companies, or investment companies") (emphasis added), *reprinted in* 3 *Leg. Hist.* 4650.

[17] Ignoring the thrust of the managers' comments, the court of appeals seized on two words (emphasized in the quotations below) in the remarks of two ERISA managers as support for its "pretextual" approach to the deemer clause. It referred (Pet. App. A19) to Senator Javits' statement that preemption applied to state laws "hastily *contrived* to deal with some particular aspect of private welfare or

the fact that the deemer clause was retained while the preemption provision was expanded, the court of appeals deduced that the deemer clause was intended to do "the more narrow, specified work which the original version of the preemption clause was meant to do" (Pet. App. A23); *i.e.*, the deemer clause protects only "core" ERISA areas from state regulation. But that extraordinary conclusion is wholly at odds with the clearly expressed purpose of the statute. It is directly contrary to the consistent recognition by this Court that the preemption provision was intended "to displace all state laws that fall within its sphere," even including state laws that are consistent with ERISA's provisions or that govern subjects not regulated by ERISA. See *Metropolitan Life*, 471 U.S. at 739; *Shaw*, 463 U.S. at 105 & n.25. It is also contrary to the statements of the conferees,

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pension benefit plans not clearly connected to the Federal regulatory scheme." 120 Cong. Rec. 29,942 (1974), *reprinted in* 3 *Leg. Hist.* 4770-4771. Of course, there is nothing in Senator Javits' statement indicating that preemption was limited to such "contrived" state laws, and such an implied restriction would make no sense in light of Congress's broad preemptive intent. Furthermore, and in direct contradiction of the court of appeals' ruling that state insurance law may govern "non-core" ERISA areas, Senator Javits emphasized that even state laws governing aspects of benefit plans "not clearly connected to the Federal regulatory scheme" are preempted. *Ibid.* Nor is the court of appeals' approach supported by Senator Williams' reference to "State professional associations acting under the *guise* of State-enforced professional regulation." 120 Cong. Rec. 29,933 (1974) (emphasis added), *reprinted in* 3 *Leg. Hist.* 4746. Like Senator Javits and Representative Dent, he stressed that, "with the narrow exceptions specified in the bill," the conference substitute "preempt[s] the field for Federal regulations." 120 Cong. Rec. 29,933 (1974), *reprinted in* 3 *Leg. Hist.* 4745.

who emphasized the breadth of the newly enacted preemption provision, without even a hint that the deemer clause was intended to perform the restrictive function of the abandoned House and Senate-passed versions of the basic preemption clause. It would have been a simple matter for the conferees to have inserted limiting language into the deemer clause had that been their intent.[18] Instead, they retained the broad language of the deemer clause referring to "*any* law of any State purporting to regulate insurance companies [or] insurance contracts" (emphasis added).[19]

Furthermore, the Conference Committee's expansion of the preemption provision would have little meaning under the court of appeals' approach. Under the court of appeals' rule, the States may regulate insured plans (as this Court held in *Metropolitan Life*), and they may also regulate uninsured plans pursuant to state insurance law, except for those areas at the "core" of ERISA. But that is essentially what the bills provided before the conference revision. Thus, the court of appeals' rule gives little meaning to the broad language of Section 514(a). Yet the conferees stressed, and this Court has repeatedly recognized, that Section 514(a) was

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[18] For example, the conferees could have revised the deemer clause so that it referred to state insurance laws regulating such matters as disclosure, vesting, and forfeitability.

[19] In *Metropolitan Life*, the Court "declin[ed] to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it" (471 U.S. at 746). The Court concluded that the Massachusetts Supreme Judicial Court's "attempt to save only state regulations unrelated to the substantive provisions of ERISA" was inconsistent with the saving clause's terms. *Id.* at 746-747.

intended to have a broad effect. *Pilot Life*, 481 U.S. at 47; *Shaw*, 463 U.S. at 96-97.[20]

B. State Insurance Regulation Of Uninsured Employee Benefit Plans Is Inconsistent With The Purposes Of ERISA's Preemption Provision

The lower courts' decision interferes with Congress's intent to avoid "endless litigation over the validity of state action that might impinge on Federal regulation." 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits), *reprinted in* 3 *Leg. Hist.* 4770. As Senator Javits explained (*id.* at 4770-4771), one of the reasons the conferees broadened the scope of the preemption provision was to eliminate questions about whether a particular state law affected a matter specifically governed by ERISA. Instead, it adopted a bright-line test—if a plan is insured, indirect regulation pursuant to state insurance laws is permissible; if the plan is uninsured, regulation is not permitted. Congress hardly intended the deemer clause to preserve the questions it thought it was eliminating. Yet, the court of appeals' "core area" test plainly does exactly that.[21]

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[20] The court of appeals suggested (Pet. App. A24) that unless its "core area" standard were adopted, the deemer clause would "swallow" the saving clause. But that is simply not so. Under *Metropolitan Life*, the saving clause protects state insurance regulation over insurance contracts purchased by employee benefit plans that would otherwise fall prey to the sweep of the Act's basic preemption provision.

[21] The similar approach adopted by the Sixth Circuit in *Northern Group Services*—"the effect of the deemer clause should be assessed by a balancing of the interests in federal uniformity against those of state primacy in the regulation of insurance" (833 F.2d at 93)—has similar defects. In that case, the court of appeals held that Section 3109a of Michi-

In addition, this Court repeatedly has stressed that Congress intended Section 514 to relieve employers of potentially conflicting state requirements, thus fostering the development of employee benefit plans.[22] The lower courts' holding that the Pennsyl-

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gan's no-fault automobile insurance law, Mich. Comp. Laws § 500.3109a (1983), is *not* preempted insofar as it requires the liability of no-fault insurers to be secondary to that of an uninsured employee benefit plan. In *Liberty Mutual Insurance Group* v. *Iron Workers Health Fund*, 879 F.2d 1384 (1989), however, the Sixth Circuit held that the same Michigan statute, Section 3109a, *is* preempted insofar as it prohibits an uninsured employee benefit plan from excluding automobile accident coverage altogether. Although the court in *Liberty Mutual* discussed *Northern Group Services* (see 879 F.2d at 1387 (noting that "[i]t would appear at first blush that *Northern Group Services* requires us to hold in this case that § 3109a is not preempted by ERISA")), it is not clear why the federal interest outweighed the state interest in the one case but not the other. It is clear, however, that under a test like the Sixth Circuit's or that of the court below, employee benefit plan funds will be expended in litigation over where the balance lies or whether a "core area" of ERISA is infringed.

[22] See *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987) ("[p]re-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations"); *Pilot Life*, 481 U.S. at 45-46 ("the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern'"); *Metropolitan Life*, 471 U.S. at 739 ("[t]he pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements"); *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. at 105 & n.25 ("Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees").

vania statute can be applied to bar petitioner's subrogation rights would frustrate Congress's purpose of freeing plans from state regulation. Through ERISA, Congress intended to leave decisions concerning the content of plans "to the discretion of * * * plan designers" (*Alessi*, 451 U.S. at 525), unimpeded by state regulation that could thwart plan growth.[23] Moreover, divergent state regulation would preclude plan administrators from "establish[ing] a uniform administrative scheme * * * [with] a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co.*, 482 U.S. at 9. Such a "patchwork scheme of [state] regulation" would "introduce considerable inefficiencies" in benefit plans, and might lead employers to reduce benefits. *Id.* at 10-11.

These concerns are directly implicated here. By virtue of the court of appeals' holding, FMC administrators can no longer operate their plan through a single administrative scheme. Rather, the viability of this multistate Plan's subrogation provision will depend upon its validity under the law of each State in which the Plan does business. Even more importantly, the lower court's holding thwarts the reasonable choice of FMC Plan designers to provide medical benefits for auto accident injuries on the condition that the Plan can recoup its outlays where there has been recovery from a negligent third party. State law preclusion of that choice clearly increases

[23] While freeing plan designers from state law restrictions, Congress did impose some significant restrictions of its own. For example, pension plans must be separately funded according to requirements set out in 29 U.S.C. 1082, and benefits must vest according to a schedule set out in 29 U.S.C. 1053.

the Plan's costs for accident-related benefits. As a result, the Plan's designers might make a downward adjustment in benefits or otherwise revise its program of personal injury protection for accidents. As this Court has noted, "ERISA's comprehensive preemption of state law was meant to minimize this sort of interference with the administration of employee benefit plans." *Shaw*, 463 U.S. at 105 n.25.[24]

To be sure, Congress intended to preserve traditional state authority over the insurance industry by virtue of the saving clause. See *Metropolitan Life*, 471 U.S. at 740-741. The relationship between the saving clause and the deemer clause, however, implements that congressional intent while preserving the freedom from state control that Congress envisioned for benefit plans. Employers that purchase insurance for the provision of employee benefits do so with the understanding that those insurance contracts may be subject to state regulation.[25] At the same time, em-

[24] The court of appeals' proviso that state insurance law may regulate only "non-core" ERISA areas (Pet. App. A19) does not go far enough to satisfy the underlying purposes of the statute. As this Court's decisions make abundantly clear (*Metropolitan Life*, 471 U.S. at 739; *Shaw*, 463 U.S. at 98-99 & nn.18-20), ERISA preemption extends to state laws that regulate plan contents even in areas left unregulated by ERISA. Thus, Congress's intent to occupy the field is not dependent upon whether the State has attempted to regulate an area specifically regulated by ERISA. Rather, as the preemption provisions establish, there is an overriding ERISA interest in freeing plans from direct state regulation.

[25] In that situation, the insurance company that sold the policy—which should be accustomed to inconsistent regulation in light of the long tradition of state primacy in the area of insurance regulation—would presumably assist the purchaser in adjusting to the differing rules of the various

ployers may choose to set up uninsured plans, which will allow them to operate on a field of federal uniformity. Although the district court suggested that the distinction between insured and uninsured plans is illogical (Pet. App. C11-C12), it in fact represents a salutary and workable accommodation between state insurance regulation and federal preemption.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1990

States. Indeed, the insurance company would bear most of the burden of adjustment itself—a burden that would be reflected at the outset in the announced cost to the purchaser.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 857